

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JAMES P. FORTSON

PLAINTIFF

vs.

Civil Action No.1:97cv284-D-D

EMBRY-RIDDLE AERONAUTICAL UNIVERSITY

DEFENDANT

MEMORANDUM OPINION

Presently before the court is the motion of the defendant for the entry of summary judgment as against the plaintiff's claims in the case at bar. Finding that the motion is well taken, the court shall grant it and dismiss the plaintiff's claims of race and age discrimination.

I. Factual Background

This is an employment discrimination case wherein the plaintiff alleges he was discriminated against because of both race and age. Embry Riddle Aeronautical University (ERAU) is a private, not-for-profit educational institution specializing in preparing individuals for careers in the aviation industry. Plaintiff, an African-American male presently sixty years of age, was Resident Center Director of ERAU at Columbus Air Force Base in Columbus, Mississippi, at all times relevant to the claims asserted in this lawsuit. See Plaintiff's Response to Motion for Summary Judgment, page 1.

In November 1996, Alice Goodrich, Regional Director of ERAU and Plaintiff's immediate supervisor, documented complaints she received from students concerning Plaintiff's management of the facility. See Defendant's Exhibit B. She wrote the plaintiff a "Letter of Counseling" indicating it was her opinion that he was misleading the students into believing they had an option concerning their course mandates. See Defendant's Exhibit C.

Portions of the letter read, " You have notified the students in the MAS Program that you have offered the Education and Safety tracks without official permission and therefore were ceasing the courses and leaving the students without any options to complete their programs. You also stated

to the students that they were not to tell anyone. These students feel threatened by you.” Id. On December 3, 1996, Ms. Goodrich again wrote the Plaintiff a second “Letter of Counseling” outlining her concerns over Plaintiff’s job performance as Center Director. Portions of that letter read, “I have received student and faculty complaints about the fact that an annual schedule is non-existent. I checked your term schedules against the annual schedule you submitted to me. To date, your Center has only offered one course that was on the annual schedule.” See Defendant’s Exhibit D.

Overall, the ERAU staff, faculty and students had complained that Plaintiff lacked organization skills, lacked insight into the program offered at ERAU, did not offer guidance to the faculty or students, did not provide a yearly course schedule and was unfamiliar with the courses needed by students. See Plaintiff’s Exhibit F. Plaintiff was put on probation on December 3, 1996, by Ms. Goodrich. See Plaintiff’s Exhibit E.

In January 1997, Plaintiff filed a grievance against Ms. Goodrich. According to the ERAU grievance policy, an employee is first to try to resolve any grievance with his immediate supervisor. See Defendant’s Exhibit G. In this case, Ms. Goodrich was plaintiff’s immediate supervisor and with it being apparent that their relationship had deteriorated to a point where resolution seemed unlikely, the Dean of Academics of the College of Career Education, Dr. Robert Hall, decided to send an investigating team of three people to the Columbus site to investigate the situation in depth. The team consisted of ERAU personnel having no relation to the Columbus site. See Defendant’s Exhibit I.

This team visited the site and interviewed members of the staff, including Plaintiff, as well as students, the Education Services Officers, and other employees at the Center. Plaintiff wrote a member of the investigating team after her visit. He voiced concerns that a cross-section of the students were not called into formulate an assessment of the problem. However, he also stated, “I was very impressed when you introduced me to the investigating party because I noticed that they appeared to be emotionally isolated, far removed from possible favoritism- and to a great extent,

impartial.” See Defendant’s Exhibit G.

The team determined that there was ample evidence of Plaintiff’s mismanagement and determined no merit existed in his allegations and grievances filed against his supervisor, Ms. Goodrich. See Plaintiff’s Exhibit F. By letter dated March 6, 1997, Dr. Robert Hall asked for Plaintiff’s resignation. See Plaintiff’s Exhibit B. Plaintiff refused to resign and was terminated. Id. Plaintiff was replaced by Cheryl Kuehn, a fifty-three year old white female.

II. Summary Judgment Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden rests upon the party seeking summary judgment to show the district court that an absence of evidence exists in the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); see Jackson v. Widnall, 99 F.3d 710, 713 (5th Cir. 1996); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996). Once such a showing is presented by the moving party, the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). Substantive law will determine what is considered material. Anderson, 477 U.S. at 248; see Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir. 1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099; Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995). Further, "[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue of fact for trial." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099. Finally,

all facts are considered in favor of the non-moving party, including all reasonable inferences therefrom. See Anderson, 477 U.S. at 254; Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995); Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994); Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir. 1996); Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 97 (5th Cir. 1996). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." Little, 37 F.3d at 1075 (emphasis omitted); see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 111 L. Ed. 695, 110 S. Ct. 3177 (1990).

III. Claims of Racial Discrimination

In his complaint, Mr. Fortson charges the defendant with racial discrimination in violation of Title VII of the Civil Rights Act. Plaintiff's Complaint, ¶ II. Title VII of the Civil Rights Act of 1965 provides in relevant part:

It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race ...

42 U.S.C. S 2000e-2(a)(1). Title VII protects all employees from racial discrimination, regardless of race. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280, 96 S.Ct. 2574, 2578, 49 L.Ed.2d 493 (1976) ("The Act prohibits all racial discrimination in employment, without exception for any group of particular employees.... "). The ultimate question in an asserted case of racial discrimination under Title VII is whether the plaintiff's race was a factor in an adverse employment decision against him. Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 544 (5th Cir.1994) ("A claim under Title VII . . . cannot 'succeed unless the employees' protected trait actually played a role in that process and had a determinative influence on the outcome.' ").

However, given that many employment discrimination cases involve elusive factual questions, the Supreme Court has devised an evidentiary procedure that allocates the burden of production and persuasion when the plaintiff is unable to come forward with direct evidence of discrimination. In a claim of race discrimination brought under Title VII, the evidentiary procedure to be utilized was originally introduced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and more recently reaffirmed in St. Mary's Honor Ctr. v. Hicks, 509 U.S.--, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Under McDonnell Douglas, the plaintiff has the initial burden of proving a prima facie case of discrimination. Id. at 802. If the plaintiff establishes a prima facie case, a presumption of discrimination arises and the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the discharge." Flanagan v. Aaron E. Henry Community Health Serv. Ctr., 876 F.2d 1231, 1233-34 (5th Cir.1989); Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir.1980). The employer need not prove the absence of a discriminatory motive. Whiting, 616 F.2d at 121. Once the employer articulates its nondiscriminatory reason, the burden is again on the plaintiff to prove that the articulated legitimate reason was a mere pretext for a discriminatory decision. Id. Ultimately, the burden of persuasion rests on the plaintiff, who must establish the statutory violation by a preponderance of the evidence. Id. (citing Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1382 (5th Cir.1980)). Even if the plaintiff succeeds in revealing the defendants' reasons for terminating him were false, he still bears the ultimate responsibility of proving the real reason was unlawful "intentional discrimination." See St. Mary's, 125 L.Ed.2d at 424 ("It is not enough to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination."). This is not to say that the employee is required to prove that the reason is in fact false, but only that the proffered reason was not the only real motivation behind the employer's decision and that discrimination was at least a substantial motivating factor in that decision. Again, a plaintiff is not required to prove that discrimination based upon race was the sole reason for the termination, because the employer may be held liable under Title VII even if legitimate reasons - such as the defendant's legitimate,

nondiscriminatory reason - also played a role in the plaintiff's termination.

[S]ince we know that the words "because of" do not mean "solely because of," we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.

Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 109 S.Ct. 1775, 1785, 104 L.Ed.2d 268 (1989).

Nevertheless, the fact that a plaintiff may establish genuine issues of material fact as to his *prima facie* case does not necessarily mean that he may avoid summary judgment on his discrimination claims.

LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 450 (5th Cir.1996); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir.1996). Rather, to avoid the grant of a properly made motion for summary judgment, a plaintiff must ultimately present evidence sufficient to make a reasonable inference of discriminatory intent. LaPierre, 86 F.3d at 450.

[A] jury issue will be presented and a plaintiff can avoid summary judgment ... if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [race] was a determinative factor in the actions of which the plaintiff complains.

Id. (citing Rhodes, 75 F.3d at 994). According to the United States Supreme Court, such evidence of falsity will permit a trier of fact to infer that the discrimination was intentional:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required"

St. Mary's, 509 U.S. at ----, 113 S.Ct. at 2749; see also Polanco v. City of Austin, Tex., 78 F. 3d 968, 976 (5th Cir. 1996). Determining that a particular reason did not actually serve as the sole basis for termination is an entirely different inquiry than determining that the proffered reason is factually false. For example, whether an employer fired a person for being incompetent is a different question from whether person is in fact incompetent. It is important to remember the distinction.

In order for the typical Title VII plaintiff to establish a *prima facie* case of racial discrimination in a disparate treatment context, he must show that he:

- 1) was a member of a protected class;

- 2) was qualified for the position that he held;
- 3) suffered an adverse employment decision; and
- 4) the plaintiff's employer replaced him with a person who is not a member of the protected class, or in cases where the employer does not intend to replace the plaintiff, the employer retains others in similar positions who are not members of the protected class.

Meinecke v. H & R Block Income Tax Sch., Inc., 66 F.3d 77, 83 (5th Cir.1995); Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir.1992); Thornbrough v. Columbus & Greenville R. Co., 760 F.2d 633, 642 (5th Cir.1985) (citing Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir.1981), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982)).

In the case at bar, the plaintiff charges that he was terminated because of his race. The only allegation plaintiff makes towards race is that his immediate supervisor, Ms. Goodrich, “shunned” him once she found out he was married to a white woman. Assuming the plaintiff has proven his *prima facie* case of racial discrimination, it is now incumbent on ERAU to come forward with legitimate, nondiscriminatory reasons for plaintiff's discharge. If ERAU comes forward with legitimate, nondiscriminatory reasons for plaintiff's termination, any inference of racial discrimination raised by plaintiff's *prima facie* case disappears, and the plaintiff must come forward with evidence that ERAU's reasons are pretext and that racial discrimination was a determinative factor in the termination.

The legitimate, non-discriminatory reasons offered by the defendant are job performance problems. These problems are explored at length in the nineteen page report prepared by the three-person investigating team following their visit to ERAU. See Defendant's Exhibit F. The court finds that the defendant has satisfied its burden to produce legitimate, non-discriminatory reason for plaintiff's termination.

Therefore, the remaining question is whether the evidence taken as whole “ (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [race] was a determinative factor in the actions of which

the plaintiff complains.” Rhodes, 75 F.3d at 994. It is apparent from these well-documented facts that the decision to terminate plaintiff was based on his poor job performance, notwithstanding that he had received good performance rating in the years before. The only reason the plaintiff provided in his deposition for racial discrimination was being “shunned” by Ms. Goodrich once she discovered that his wife was white. Speculative, unsubstantiated assertions are not sufficient to create an inference of discrimination. Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994).

IV. Claims of Age Discrimination

In order to establish a *prima facie* case in an age discrimination lawsuit, the plaintiff must prove (1) that he is within the group protected by the Age Discrimination in Employment Act (ADEA), (2) that he was qualified for his job, (3) that there was an adverse employment decision and (4) that he was replaced by someone substantially younger. O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1307, 1310 (1996). For the purposes of analyzing this claim, the court shall assume that the plaintiff makes a *prima facie* case of age discrimination.

So assuming, the court’s next inquiry is whether ERAU has produced a legitimate, nondiscriminatory reason for that failure. The court finds the reasons already set forth in this opinion concerning the plaintiff’s poor job performance evidenced by a nineteen page summation of administrative problems are legitimate, nondiscriminatory reasons for his termination. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993-94 (5th Cir. 1996) (holding that plaintiff cannot prevail unless age was a ‘determinative factor’ in adverse employment decision).

The Fifth Circuit has held “that an employee’s subjective belief of discrimination, however genuine, cannot be the basis for judicial relief.” EEOC v. Louisiana Office of Community Servs., 47 F.3d 1438, 1448 (5th Cir. 1995). Plaintiff offers only the following in his deposition for his reason to believe he was discriminated because of his age:

Q. Tell me why you think you were discriminated against because of your age.

A. I know I had been working for the university a long time and the longer you work, the more money you get. My pay had gotten pretty high in accordance with

Embry-Riddle standards. Having been there a long time related to my age. You've got to have some age to be there. When somebody of age is released or fired, the new person that comes on gets less money so they made money by letting go.

Plaintiff's Deposition at p. 21.

Plaintiff has offered insufficient proof that ERAU's stated reasons for his termination were a pretext for age discrimination.

III. Conclusion

Based upon the admissible evidence before this court, the undersigned is of the opinion that the plaintiff has failed to come forward and refute a properly made motion for summary judgment on the ultimate issue of discrimination in this case. That is, no reasonable juror, could, based upon the evidence before this court, determine that the plaintiff's race or age was a substantial motivating factor in the decision of the defendant to terminate his employment. There is no genuine issue of material fact regarding the plaintiff's claims and the defendant is entitled to the entry of a judgment as a matter of law.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

United States District Judge

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JAMES P. FORTSON

PLAINTIFF

vs.

Civil Action No.1:97cv284-D-D

EMBRY-RIDDLE AERONAUTICAL UNIVERSITY

DEFENDANT

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AND CLOSING CASE

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

- 1) the motion of the defendant for the entry of summary judgment on its behalf with regard to the plaintiff's claims is hereby GRANTED;
- 2) the plaintiff's claims are hereby DISMISSED; and
- 3) this case CLOSED.

SO ORDERED, this the _____ day of April 2001.

United States District Judge